

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions	:	
of	:	
BAP APPLIANCE CORP.	:	DETERMINATION
AND RUTH EPSTEIN, AS OFFICER	:	
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1981	:	
through November 30, 1984.	:	

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Petitioners, BAP Appliance Corp. and Ruth Epstein, as officer, 972 South End, Woodmere, New York 11598, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1981 through November 30, 1984 (File Nos. 802404 and 802405).

A hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on May 12, 1988 at 9:45 A.M. Petitioners appeared by Mario A. Procaccino, Esq. (Morris D. Weintraub, Esq., of counsel). The Audit Division appeared by William F. Collins, Esq. (Michael Glannon, Esq., of counsel).

ISSUE

Whether petitioners have shown reasonable cause and are thus entitled to remission of penalties and statutory interest imposed for failure to pay over the proper amount of sales and use taxes due.

FINDINGS OF FACT

1. Petitioner BAP Appliance Corp. ("the corporation") was formed on June 1, 1968, and for approximately 20 years operated a furniture and household appliance store. During the period at issue, the store was located at 1735 Pitkin Avenue, Brooklyn, New York. The corporation terminated the business on February 29, 1988.

2. Petitioner Ruth Epstein was president and sole shareholder of the corporation. She was not involved in the business on a day-to-day basis, however, and visited the store only infrequently. The corporation's Federal income tax returns show that Mrs. Epstein received salary income of \$2,500.00 in the fiscal year ending March 31, 1982, \$6,475.00 in the fiscal year ending March 31, 1983 and \$7,800.00 in the fiscal year ending March 31, 1984.

3. The business was managed by Ruth Epstein's husband, Bert Epstein, who was assisted by the Epsteins' son-in-law, Richard Smoke. The business usually had three other employees during the audit period.

4. A Federal/State computer tape match showed that for the fiscal year ending March 31, 1983 the corporation reported gross sales of \$289,437.00 on its Federal income tax return, but

reported only \$62,962.00 in taxable sales on its sales tax returns. (The sales tax returns did not show any gross sales figures.) This discrepancy indicated a percentage of error of 359.70 percent.

5. A field audit of the corporation's books and records was conducted with the following results:

(a) The corporation's business records were found to be in fair condition.

(b) Gross sales reported on the corporation's Federal income tax returns and shown on its books for the audit period were \$909,702.00 while taxable sales per sales tax returns were \$196,560.00, a difference of \$713,142.00 in additional taxable sales. The difference was due to layaway sales, which the corporation contended upon audit were nontaxable.

(c) Sales tax was found to have been paid on all fixed assets. Expense items were found to be negligible and there were no areas of noncompliance.

(d) Tax due of \$58,854.21 was calculated on the \$713,142.00 in additional taxable sales. Imposition of penalty and statutory interest was recommended by the auditor.

6. The corporation executed a consent extending the period of limitation for assessment of sales and use taxes for the period December 1, 1981 through November 30, 1984 to December 19, 1985.

7. On April 11, 1985, the Audit Division issued identical notices of determination and demands for payment of sales and use taxes due to the corporation and to petitioner Ruth Epstein, as officer, for the period December 1, 1981 through November 30, 1984. The amounts assessed were as follows: tax due \$58,854.18, penalty \$11,778.48 and interest \$13,187.03, for a total of \$83,819.69.

8. The Audit Division claimed upon audit that all layaway sales were taxable. It later conceded that uncompleted layaway sales were not taxable, but claimed that petitioners owed tax on all layaway sales which could not be substantiated as unfulfilled.

9. The business was located in an economically-depressed area and much of its sales volume was due to layaway sales.

10. Petitioners and the Audit Division ultimately stipulated to petitioners' liability in the reduced amount of \$51,725.00 in tax. The only issue remaining is whether petitioners are liable for penalty and statutory interest above the minimum.

11. The entries in the corporation's books were made by Bert Epstein. He would make daily entries of monies received and at the end of each week would post entries of delivered merchandise into the sales tax book. Each entry consisted of an order number, a gross amount, a taxable amount and the tax.

12. It was Mr. Epstein's understanding, based on the advice of the accountants retained by the corporation, that layaway sales were not subject to sales tax.

13. An accountant from the accounting firm retained by the corporation would come to the store once a month. The accountant would go over all books and reconcile the checkbook with

the bank statement. At the end of each quarter, the accountant would prepare a sales tax return based on the sales tax book kept by Mr. Epstein.

### CONCLUSIONS OF LAW

A. That during the period at issue Tax Law § 1145(a)(1)(former [i]) provided as follows:

"Any person failing to file a return or to pay or pay over any tax to the tax commission within the time required by this article shall be subject to a penalty of five percent of the amount of tax due if such failure is for not more than one month, with an additional one percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate; plus interest at the rate of one percent of such tax or one-twelfth of the annual rate of interest set by the tax commission pursuant to section eleven hundred forty-two, whichever is greater, for each month of delay after such return was required to be filed or such tax became due."

B. That Tax Law § 1145(a)(1)(iii)<sup>1</sup> provides as follows:

"If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit all of such penalty and that portion of such interest that exceeds the interest that would be payable if such interest were computed at the rate set by the tax commission pursuant to section eleven hundred forty-two. The tax commission shall promulgate rules and regulations as to what constitutes reasonable cause."

C. That the term "tax commission" as used in the first sentence of Tax Law § 1145(a)(1)(iii) is to be construed as meaning the Division of Tax Appeals or the Tax Appeals Tribunal (Tax Law § 2026).

D. That petitioners have not shown reasonable cause for their failure to properly remit the taxes due. It is irrelevant whether the corporation incorrectly interpreted its accountant's advice as to layaway sales or whether it was incorrectly advised. It was not reasonable for the corporation's management to assume that such sales were never taxable, particularly where layaways constituted such a substantial portion of its business. It is noted that ignorance of the law does not constitute reasonable cause (20 NYCRR former 536.1 effective December 27, 1979<sup>2</sup>).

E. That the petitions of BAP Appliance Corp. and Ruth Epstein, as officer, are denied and the notices of determination and demands for payment of sales and use taxes due issued on April 11, 1985, as reduced per the stipulation of the parties (Finding of Fact "10"), are sustained.

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<sup>1</sup>Formerly Tax Law § 1145(a)(1)(ii), renumbered by L 1985, ch 65, effective September 1, 1985 and applicable to taxes due or remaining unpaid on or after said date.

<sup>2</sup>Renumbered 20 NYCRR 536.5 effective September 3, 1985.

DATED: Albany, New York

October 20, 1988

Mulligan \_\_\_\_\_ /s/ Robert F.  
ADMINISTRATIVE LAW JUDGE